

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

Docket No. 74-1456

HARRY BERNSTEIN,

Petitioner,

-v.-

HONORABLE ANTHONY J. TRAVIA,
UNITED STATES DISTRICT JUDGE,
EASTERN DISTRICT OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION
FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE,
FOR AN AMENDMENT OF THIS COURT'S OPINION

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QUESTION PRESENTED FOR REVIEW

Did this Court, in denying the petition for a writ of mandamus, misconstrue the facts concerning the assertion of petitioner's counsel that, under the circumstances, petitioner would not be called to testify?

PRELIMINARY STATEMENT

Petitioner, Harry Bernstein, petitions the Court for rehearing of the denial of his petition for writ of mandamus, or, in the alternative, an amend-

ment of this Court's opinion to reflect the true facts with regard to what is shown in the record of proceedings in the Court below as to the decision of petitioner's counsel not to have petitioner testify in his own behalf.

By an application dated April 11, 1974, petitioner moved this Court for a writ of mandamus, directed to the Honorable Anthony J. Travia, United States District Judge for the Eastern District of New York, for the purpose of compelling Judge Travia to: 1) grant petitioner a severance and a mistrial with regard to the trial of Indictment No. 72 Cr. 587, currently in progress, upon the ground of petitioner's documented physical condition, or, in the alternative, 2) to grant petitioner an evidentiary hearing to take the testimony of expert medical witnesses, one of whom having been previously appointed by Judge Travia, as to why they were of the opinion that petitioner's continuance on trial would be hazardous to his life and well-being, and as to the likelihood of such dire consequences.

On April 11, 1974, the Honorable Henry J. Friendly, Judge of the Court of Appeals, ordered that the petition be placed upon the calendar of this Court for argument on April 15, 1974.

On April 15, 1974, argument was heard, and this Court denied the petition from the Bench. Thereafter, on April 17, 1974, this Court, in an opinion by the Honorable Irving R. Kaufman, set forth the reasons for the denial of the petition.

Since the background facts with regard to the petition are set forth in the papers which were filed in support of the petition, we shall not repeat those facts here. Suffice it to say, that petitioner, has a history of serious cardiac illness, and that, during the course of a trial which has already lasted seven months, he suddenly suffered serious cardiac symptoms. Two eminent cardiologists, one petitioner's physician and the other appointed by the Court at the designation of the United States Attorney's office, concluded that it would be hazardous for the petitioner to continue on trial and it would be particularly hazardous for him to be exposed to direct and cross-examination.*

* Following this Court's denial of the petition for a writ of mandamus, petitioner applied to the District Court for permission to absent himself from the remainder of the trial. That permission was granted by the District Court and the petitioner has not since attended at trial, although the trial against him continues.

This Court's opinion, at p. 2923 of the slip sheet opinion, recites as follows:

"On April 4, the District Court heard argument from Bernstein's counsel for a severance or, in the alternative, a continuance of undetermined duration. The Government, of course, opposed the motion. At that argument Judge Travia inquired of Brodsky if he intended to call Bernstein to testify, to which Brodsky responded that he did not.*"

The above noted assertion was footnoted as follows:

"We note that Brodsky does not claim, in his papers in support of this petition, that his decision not to call Bernstein to testify in his own behalf was in any way influenced by Bernstein's physical condition."

In fact, the proceedings of April 4, 1974, three copies of which were filed with this Court in support of the petition, show the following at pp. 15965-7:

"The Court: Now, he [Dr. Pindexter] makes that last statement based upon his report, which I believe I have described myself on the record here, but he certainly indicates -- and I have to repeat the wording, 'the question comes now as to whether it is safe for him to continue the present trial were he a defendant and would probably be exposed to examination and cross-examination.'

"He doesn't know that any more than I do unless he was given that information and not I, because I think that might have some bearing

on the final statement that he makes.

"Now, Mr. Brodsky, I will continue in a moment, and I would like to ask you a question: Is he or is he 'ain't? [sic]

"Mr. Brodsky: I beg your pardon?

"The Court: Is he going to testify or is he not?

"Mr. Brodsky: Now? Under no circumstances.

"The Court: In other words, you feel that it would be your opinion to tell him not to testify?

"Mr. Brodsky: Absolutely. Based upon - -

"The Court: Is it based upon this report?

"Mr. Brodsky: Based upon both reports, absolutely.

"The Court: All right.

"The Court: At least I know which way I must, therefore, go. Because I am going to take your word in making my decision on the case that you shall not - -

"Mr. Brodsky: If your Honor doesn't sever, if your Honor says that he must continue with the trial, if he's brought to Court, I will not - - based upon these two reports, ask him to take the stand.

"The Court: That is your opinion?

"Mr. Brodsky: That is my decision.

"The Court: That is your opinion.

"Mr. Brodsky: That's my decision.

"The Court: And that's going to be your advice to Mr. Bernstein?

"Mr. Brodsky: Not only my advice, I will not permit him to take the stand.

"The Court: That is more than advice to him.

"Mr. Brodsky: Yes, sir.

"The Court: In other words, you are telling Mr. Bernstein that he is not going to?

"Mr. Brodsky: Under no circumstances.

"The Court: All right. Of course, Dr. Poindexter does not know of that decision?

"Mr. Brodsky: I beg your pardon?

"The Court: Dr. Poindexter, at the time he wrote this letter, didn't know of that decision?

"Mr. Brodsky: Judge, you are basing your opinion on Dr. Poindexter's report.

"The Court: I haven't gone to Dr. Dack's at all yet.

"Mr. Brodsky: Let's go to Dr. Dack's.

"The Court: When I get good and ready, I take care of one step at a time.

"Mr. Brodsky: You asked me to make a decision and I have made a decision based upon both reports.

"The Court: I understand that.
I am just saying that Dr. Poindexter
didn't know that at the time he made
his report. Because he says, 'and
who would probably be exposed to exam-
ination and cross-examination.' So
that he's assuming that he will be."
[Emphasis added]

See also proceedings of April 4, 1974, at
pp. 15971-2.

In view of the above noted excerpt from the
minutes, it is not at all true that counsel's decision
not to call petitioner "to testify in his own behalf
was in any way influenced by Bernstein's physical con-
dition" (slip sheet opinion, at p. 2928, fn.)

REASONS FOR GRANTING REHEARING, OR,
IN THE ALTERNATIVE, FOR AMENDING
THIS COURT'S OPINION TO SHOW THE
TRUE FACTS

The proceedings of April 4, 1974, from which
the above quoted extracts are taken, were filed in
support of petitioner's application to this Court.

At p. 2928, this Court specifically referred to the
colloquy between the District Judge and counsel con-
cerning counsel's intention as to whether petitioner
would be called as a witness in his own behalf. It
is clear, that this Court's opinion, particularly in
light of the above quoted footnote, thoroughly miscon-
strued or misread counsel's response to Judge Travia's

question. Certainly, as shown by the above emphasized portions of the colloquy, the District Judge understood why counsel had made his decision. It would appear that this Court's misinterpretation of the proceedings of April 4th was of decisional importance. Upon that ground, therefore, petitioner respectfully requests rehearing of the petition for a writ of mandamus.

Alternatively, in the interests of accuracy, and in the interests of properly preserving the issue for future review, it is respectfully requested that this Court's opinion of April 17, 1974, be modified to reflect the true facts.

There is a world of difference between whether a defendant on trial voluntarily determines not to exercise his right to testify in his own behalf, on the one hand, or, on the other hand, if his decision not to testify is effectively pre-empted by the unequivocal opinions of medical experts that to do so would present a clear and present danger of a fatal or otherwise incapacitating attack. In the latter instance, his decision is not a free one, but rather controlled by circumstances for which he is not responsible. Under those circumstances, he is effectively denied his right to a fair trial. To argue that the defendant

may not have testified in any event, begs the question. He has, in fact, been deprived of the right and opportunity to make a decision.

CONCLUSION

For all of the above reasons, the petition for rehearing should be granted, and upon rehearing, the petition for a writ of mandamus should be granted; in the alternative, this Court's opinion of April 17, 1974, should be modified to reflect the true facts.

Respectfully submitted,

ABRAHAM H. BRODSKY
Attorney for Petitioner

HENRY J. BOITEL
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1078—September Term, 1973.

(Argued April 15, 1974 Decided April 15, 1974
 Filed April 17, 1974.)

Docket No. 74-1456

HARRY BERNSTEIN,

Petitioner,

v.

HONORABLE ANTHONY J. TRAVIA, United States
District Judge, Eastern District of New York,

Respondent.

UNITED STATES OF AMERICA,

v.

HARRY BERNSTEIN, ROSE BERNSTEIN, EASTERN SERVICE CORP.,
HERBERT CRONIN, FLORENCE BEHAR, DUN & BRADSTREET,
ARTHUR PRESCOTT, MELVIN CARDONA, JOSEPH JANKOWITZ,

Defendants.

Before:

KAUFMAN, *Chief Judge*,
CLARK, *Associate Justice,* and Smith, Circuit Judge.*

Petition by Harry Bernstein for a writ of mandamus
directing Hon. Anthony J. Travia, United States District

* United States Supreme Court, retired, sitting by designation.

Judge for the Eastern District of New York, to grant Bernstein's motion for a severance or, in the alternative, a continuance on grounds of ill health.

Petition denied.

ABRAHAM H. BRODSKY, New York, New York,
for Petitioner.

ANTHONY T. ACCETTA, Assistant United States
Attorney (Edward John Boyd, V, Acting
United States Attorney for the Eastern
District of New York, of Counsel), *for
Respondent.*

KAUFMAN, *Chief Judge:*

Harry Bernstein petitions this Court for a writ of mandamus directing Judge Travia to grant Bernstein, a defendant in a pending criminal action, a severance and a mistrial or, in the alternative, a continuance until he is physically capable of proceeding with his trial.¹ Bernstein and his wife, Rose, are among nine defendants charged in a 65-count indictment with making false statements to the Federal Housing Administration on mortgage insurance applications, and with bribery in connection with those applications. Trial commenced on October 1, 1973, before Judge Travia and a jury, and the Government did not complete its case until March 21, 1974, almost six months later.

1 Following a 19-day adjournment, Bernstein's trial was set to resume on the morning of April 15, the date we heard argument in this mandamus proceeding. So that there would be no further delay in this jury case, which has been in progress for more than six months, we announced our decision denying Bernstein's petition in open court. We are of the view, however, that the reasons for our action should be set forth more fully.

On March 27, 1974, Bernstein's counsel, Abraham Brodsky, informed Judge Travia that at 5:00 a.m. that morning Bernstein had suffered chest pains, lasting approximately one hour, and that he was then hospitalized. Although Bernstein had suffered a serious coronary thrombosis in December 1966, all objective testing after the chest pains on March 27 revealed no additional heart damage.

On April 2, at Brodsky's request, Judge Travia telephoned Bernstein's cardiologist, Dr. Charles Poindexter, and spoke to him at length about Bernstein's condition. The following day, Dr. Poindexter confirmed the absence of any incremental damage to the heart in a letter to the judge in which he also stated that Bernstein had experienced symptoms of angina pectoris. Dr. Poindexter concluded his letter with the following prognosis:

for [Bernstein] to continue the present trial where he is a defendant and who would probably be exposed to examination and cross-examination . . . [would not be] safe, or wise . . .

In addition to Dr. Poindexter's letter, Judge Travia received a copy of a letter, dated April 3, from Dr. Simon Dack addressed to George Bashian, an Assistant United States Attorney. Dr. Dack, appointed by the court at the instance of the Government, had examined Bernstein on April 3 and concluded:

From a medical point of view, the procedure would be to keep the patient in the hospital for a few more days and if his condition remains stable, he should be observed at home for at least two more weeks. Ordinarily he would not be allowed to resume normal physical activities or exposure to any stress for at least a month. In view of the patient's history of previous myocardial infarction and a recurrence of

unstable angina, I believe that this individual would *always* be at risk if he were subjected to continued emotional strain that would be required during a court trial. This would be particularly true if he would have to take the witness stand. (emphasis added)

On April 4, the district court heard argument from Bernstein's counsel for a severance or, in the alternative, a continuance of undetermined duration. The Government, of course, opposed the motion. At that argument Judge Travia inquired of Brodsky if he intended to call Bernstein to testify, to which Brodsky responded that he did not.² Judge Travia then ruled that the trial would continue and that Bernstein was to be present on April 9. Thereafter, the trial was adjourned until April 15 for unrelated reasons.

One week later, on April 11, another round of arguments on Bernstein's motion was scheduled by the district court, prompted by a second letter from Dr. Poindexter. In this letter, dated April 10, Dr. Poindexter stated his concern over Bernstein's presence at trial in these terms:

I still feel that the anxiety and nervous tension created by being in the courtroom and hazarding the outcome of the jury's verdict, even though Mr. Bernstein is not subjected to direct and cross-examination, is *very likely* to be dangerous and to precipitate another attack of coronary thrombosis, which in turn, may be fatal. (emphasis in original)

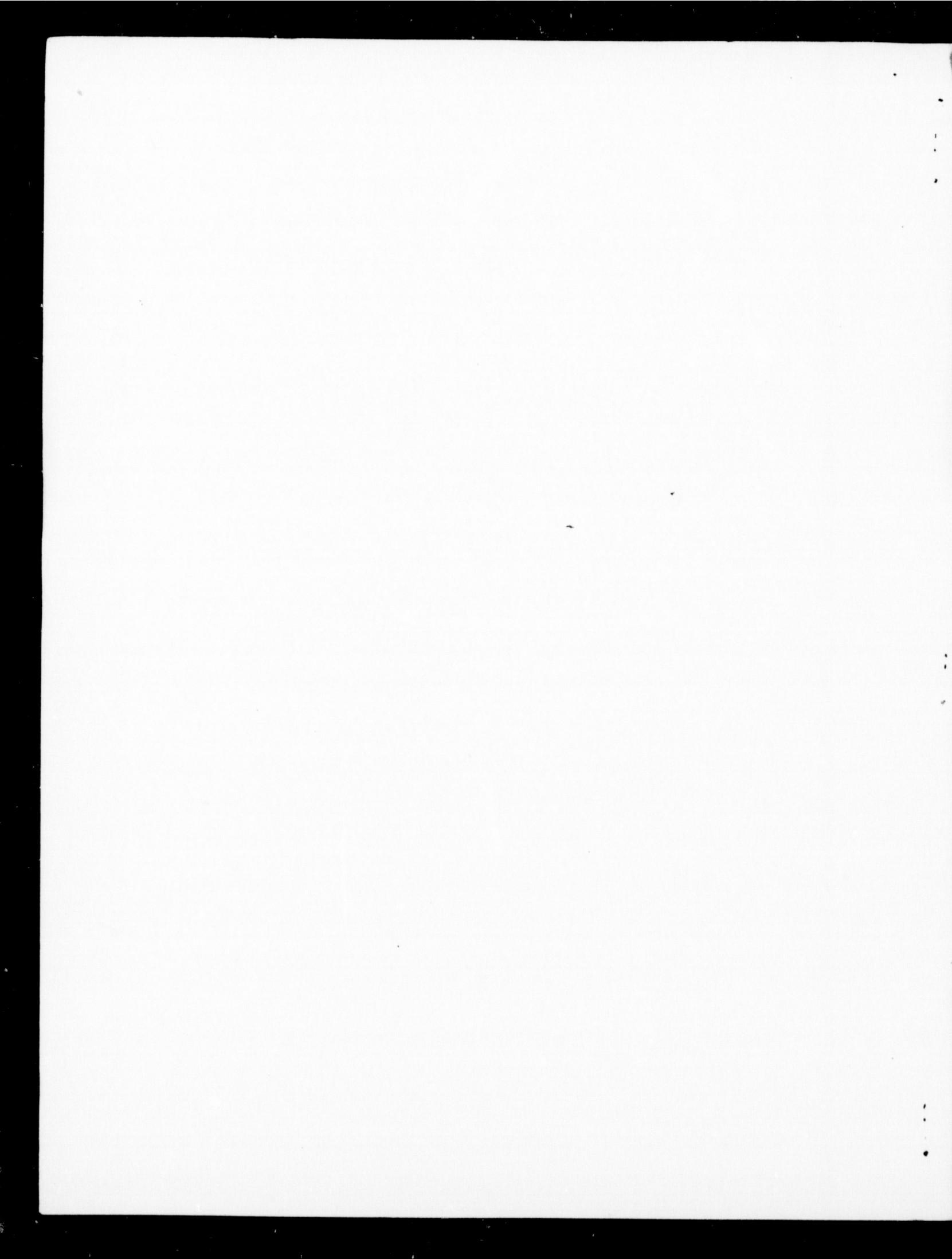
After lengthy discussion with counsel, Judge Travia declined to modify his previous denial of Bernstein's motion. During the course of argument, he expressed no fewer than six reasons for this decision: (1) all tests taken following

² We note that Brodsky does not claim, in his papers in support of this petition, that his decision not to call Bernstein to testify in his own behalf was in any way influenced by Bernstein's physical condition.⁴

the angina attack proved to be basically negative, (2) some risk of a second coronary would always plague Bernstein, (3) medical assistance could be provided in the courtroom, (4) Bernstein would not be called to testify, (5) the Government's lengthy case had been completed, (6) Bernstein would suffer a great deal of anxiety, in any event, so long as his wife remained on trial. Bernstein's motion for an evidentiary hearing on his medical condition was also denied by Judge Travia.

Whether a defendant's physical condition is so poor as to require a continuance or severance is not only a difficult determination for a judge to make, but it is one which carries with it the tremendous responsibility of weighing the invariably unpredictable factor of a defendant's health against the Government's, indeed the public's, legitimate interest in a fair and speedy disposition. Troublesome though it may be, however, that decision, as we have repeatedly held, *see e.g. United States v. Bernstein*, 417 F.2d 641, 643 (2d Cir. 1969); *United States v. Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967)³ is one reserved to the sound discretion of the district judge. In this instance, the various factors cited by Judge Travia in the course of the April 11 argument amply demonstrate that his decision was not an abuse of discretion. Nor, in our view, would a hearing, at which medical testimony would be adduced, serve any purpose here since there seems to be no dispute over the basic medical facts; only the conclusion to be drawn therefrom is contested. Accordingly, and with the fervent hope that this already overly protracted trial will soon be completed, we deny the petition for mandamus.

³ And see *United States v. Shaffer*, 433 F.2d 928, 930 (5th Cir. 1970).



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CERTIFICATE OF SERVICE

ABRAHAM H. BRODSKY, being the attorney for the Petitioner, herein, hereby certifies that on the 25th day of April, 1974, he served copies of the within Petition upon the Hon. Anthony J. Travia and upon the United States Attorney for the Eastern District of New York, by placing the same, properly addressed to them in a United States Post Box at New York, New York, having first affixed proper first class mail postage thereto.

New York, New York
April 25, 1974

Abraham H. Brodsky